No. 92-357

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

RUTH O. SHAW, *et al.*,

Appellants,

v.

WILLIAM BARR, *et al.*,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. SENATOR JESSE HELMS, AND THE EQUAL OPPORTUNITY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.

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INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting the ideal of a color-blind society in which the civil rights of all Americans are respected equally. To that end, WLF has appeared before this Court as well as other state and federal courts in cases raising important civil rights issues. *See, e.g., Chisom v. Roemer,*

111 S. Ct. 2354 (1991); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Podberesky v. Kirwan*, 956 F.2d 52 (4th Cir. 1992).

Jesse Helms is a United States Senator from North Carolina. He is troubled by any congressional districting scheme for North Carolina that results in the unnecessary division of communities (and even precincts) into three or more separate congressional districts.

The Equal Opportunity Foundation is a nonprofit educational organization founded in 1986 dedicated to protecting the civil rights of all Americans. It does not believe that the cause of civil rights is advanced by creating electoral districts designed to ensure the election of members of particular racial or ethnic groups.

Amici believe that the people of North Carolina were ill-served by the congressional districting scheme being challenged in this case. Racial gerrymandering -- by placing the state's stamp of approval on the notion that people of different races are inherently different from one another -- is a giant step backward from our goal of a color-blind society. Nothing in the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 *et seq.*, requires such gerrymandering. More importantly, the Constitution prohibits a state from treating its citizens (as did North Carolina in this case) merely as members of a particular racial group rather than as individuals.

Amici believe that their experience in litigating issues of this sort may prove of assistance to the Court in its consideration of this case. *Amici* submit this brief on behalf of Appellants with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF FACTS

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case contained in Appellants' brief.

In brief, Appellants are five citizens of Durham County, North Carolina who object to the congressional districting plan adopted by the North Carolina legislature on January 24, 1992. The plan was expressly designed so that a significant majority of voters in two of the state's twelve congressional districts (the First and the Twelfth) are African Americans (hereinafter referred to as "majority-minority" districts). Three Appellants were placed into the Twelfth District, and two were placed into the Second District.

Some sort of redistricting scheme had been made necessary by North Carolina's substantial population growth during the 1980's, as measured by the 1990 Decennial Census. That growth entitled North Carolina to a twelfth seat in the U.S. House of Representatives, whereas it previously had had only 11 seats.

The General Assembly of North Carolina initially adopted a redistricting plan on July 9, 1991 that created one majority-minority district (the First District) in the northeastern part of the state. Because a portion of the state's counties are subject to the special provisions of § 5 of the Voting Rights Act, 42 U.S.C. § 1973c,[1] the state

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[1] Section 5 provides that any state or political subdivision with a history of abnormally low voter registration (as defined in 42 U.S.C. § 1973b(b)) must, before conducting elections that conform with a new redistricting scheme, obtain a declaratory judgment from the United States District Court for the District of Columbia that the redistricting scheme "does not have the effect of denying or abridging the right to vote on account of race or color." Section 5 further provides that the state or political subdivision need not obtain such a declaratory judgment if the redistricting scheme has been submitted to the U.S. Attorney General and the Attorney General has not objected thereto within 60 days.

submitted the July 9, 1991 plan to the U.S. Attorney General for pre-clearance. Jurisdictional Statement Appendix ("Jur. App.") 3a.

The Attorney General interposed a timely objection to the July 9, 1991 plan. A December 18, 1991 letter from Assistant Attorney General John R. Dunne stated that the Attorney General objected to the plan because "the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear[s] to minimize minority voting strength given the significant minority population in this area of the state." Jur. App. 3a. The letter further stated that although the General Assembly was "well aware" of significant interest in creation of a second minority-majority district in the south-central to southeast portion of the state and although plans creating such a district had been presented to the General Assembly, it rejected such plans "for what appears to be pretextual reasons." Jur. App. 4a.

The General Assembly then adopted a new redistricting plan on January 24, 1992, the one at issue in this lawsuit (the "Plan"). Although the Plan created a second majority-minority district, it was not in the south-central to southeast portion of the state (where the Attorney General had said that the first plan had improperly minimized minority voting strength) but (in the words of the district court) "in a thin band, sometimes no wider than Interstate Highway 85, some 160 miles long, snaking diagonally across piedmont North Carolina from Durham to Gastonia." Jur. App. 4a-5a. As a result of the "tortured configuration" of this new Twelfth District, "many precincts, counties, and towns in North Carolina are divided among two or even three congressional districts." Jur. App. 5a. The Attorney General did not object to the Plan.

Appellants filed suit on March 12, 1992, alleging that the Plan violated their rights under the U.S. Constitution. Appellants alleged that the First and Twelfth Districts had been drawn for the express purpose of creating majority-

minority districts, and that no other rational explanation could be raised to support the drawing of such radically irregular district lines. Jur. App. 81a. Named defendants included not only state officials responsible for adopting and carrying out the Plan, but also federal officials who allegedly pressured the state officials into adopting the plan.

A three-judge panel of the United States District Court for the Eastern District of North Carolina dismissed the federal defendants for lack of subject matter jurisdiction,[2] and dismissed the entire suit for failure to state a claim. Jur. App. 1a-25a. The district court held that this Court's decision in *United Jewish Organizations, Inc. v. Carey ("UJO")*, 430 U.S. 144 (1977), required dismissal because Appellants had not made two allegations central to any constitutional challenge: that the Plan "was adopted with the purpose and effect of discriminating against white voters such as plaintiffs on account of their race," and that it "has operated to 'fenc[e] out the white population of the [state, or either of the two challenged districts], [or to] minimize or unfairly cancel out white voting strength.'" Jur. App. 22a-23a (quoting *UJO* at 165 (plurality opinion)). Appellants filed this appeal from the dismissal pursuant to 28 U.S.C. § 1253.

SUMMARY OF ARGUMENT

The district court's dismissal of this lawsuit was based on a fundamental misunderstanding of this Court's decision in *United Jewish Organizations v. Carey ("UJO")*, 430 U.S. 144 (1977). That decision did not immunize from constitutional attack all redistricting plans adopted in an attempt to comply with the requirements of the Voting

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[2] The district court held that § 14(b) of the Voting Rights Act, 42 U.S.C. § 1973*l*, requires that challenges to federal government actions taken pursuant to § 5 of the Act may be brought only in the United States District Court for the District of Columbia. Jur. App. 9a. *Amici* do not take exception to that portion of the district court's holding.

Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* Rather, the plurality decision in that case merely held that jurisdictions subject to § 5 of the Voting Rights Act may, when adopting voting-method changes such as redistricting plans, take race-conscious steps to ensure that adoption of the changes does not weaken the voting strength of disadvantaged racial groups. Thus, putting aside the fact that the North Carolina General Assembly was not pressured by the Attorney General into adopting the Plan, any desire that the General Assembly may have had to comply with the Voting Rights Act does not immunize the Plan from constitutional challenge. Moreover, the Voting Rights Act could not be more explicit in stating that the type of racial gerrymandering engaged in by the General Assembly for the purpose of achieving proportional representation by race is not required under § 2 of the Act.

Both the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment prohibit the racial gerrymandering that occurred in this case. The district court's conclusion to the contrary was based on the mistaken notion that constitutional injury is measured in terms of the overall effect that the challenged state action has on racial groups, rather than in terms of the effect of that action on the individual plaintiff.

ARGUMENT

I. THE ATTORNEY GENERAL'S CONDUCT DOES NOT PRECLUDE A FINDING THAT THE PLAN WAS ADOPTED WITH INVIDIOUS DISCRIMINATORY INTENT

The State Appellees argue that, as a matter of law, they may not be found to have acted with an invidious discriminatory intent in enacting the Plan, because the Plan was enacted in a good-faith attempt to comply with the directions of the Attorney General and the Voting Rights Act. State Appellee's Motion to Affirm at 14-15. That argument is without merit because it simply does not square with the facts as alleged in this case.

As noted above, the Attorney General never gave any directions to North Carolina regarding how to comply with the Voting Rights Act. Rather, the Attorney General merely interposed an objection to the July 9, 1991 plan on the basis that it appeared "to minimize minority voting strength" in the south-central and southeast portions of the state, and suggested that the General Assembly's reasons for failing to create a majority-minority district in that portion of the state "appear[ed] to be pretextual." Jur. App. 3a-4a. Thus, the Attorney General cannot be said to have pressured the General Assembly into creating a second majority-minority district; the face of his letter suggests that he would have been satisfied for § 5 purposes if the General Assembly had provided a non-pretextual reason (such as, for example, a desire to create compact districts) for failing to create a second majority-minority district.

Moreover, to the extent that the Attorney General can be said to have given directions regarding how to comply with the Voting Rights Act, the General Assembly ignored them. Rather than creating a second majority-minority district in the south-central to southeast portion of the state (as the Attorney General's letter might be read as suggesting it do), the General Assembly created a 160-mile-long Twelfth District that snakes across piedmont North Carolina. It is difficult to fathom how the State Appellees can defend this suit based on a claim that the General Assembly was merely following the directions of the Attorney General, when the General Assembly did not, in fact, follow those directions. The Attorney General never once suggested that earlier redistricting plans improperly minimized minority voting strength in piedmont North Carolina.

Nor does it matter, for purposes of ruling on a motion to dismiss, that Appellants themselves argue that the General Assembly was pressured into acting as it did by the Attorney General. *See* State Appellees' Motion to Affirm at 14 n.9. Appellants also argue, alternatively,

that the General Assembly acted with a racially discriminatory purpose of its own. Jur. App. 101a-104a. Pleading in the alternative is an acceptable pleading method, and neither of Appellants' theories of the case is precluded simply because it is inconsistent with another theory raised in the pleadings.

Furthermore, the State Appellees' "the-devil-made-me-do-it defense" is inconsistent with the limited role assigned to the Attorney General under § 5 the Voting Rights Act. States and political subdivision that are subject to the requirements of § 5 are under no obligation to seek preclearance from the Attorney General before implementing a voting change. Rather, they may avoid all contact with the Attorney General by filing a declaratory judgment action in the United States District Court for the District of Columbia, seeking judicial approval of the voting change. *See Clark v. Roemer* , 111 S. Ct. 2096, 2101 (1991).[3] Accordingly, the Attorney General simply is in no position to force a state against its will to engage in racial gerrymandering; if a state objects to pressure being placed on it to engage in racial gerrymandering, then it is free to bypass the Attorney General by filing a declaratory judgment action.

Nothing in this Court's *UJO* decision is to the contrary. In *UJO*, the Supreme Court rejected a constitutional challenge to a New York State redistricting plan that was consciously designed to create seven state assembly districts with at least 65% nonwhite populations.

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[3] In any subsequent court proceedings, the opinion of the Attorney General regarding whether the voting change at issue complied with § 5 of the Voting Rights Act apparently would be entitled to little or no deference. *See* 42 U.S.C. § 1973c ("Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object . . . shall bar a subsequent action to enjoin enforcement."); *Beer v. United States*, 425 U.S. 130 (1976) (over objections of Attorney General, declaratory judgment entered in favor of city to the effect that its redistricting plan complied with § 5; no indication that Attorney General's objections are entitled to deference).

A plurality of the Justices were willing to uphold the plan on the grounds that New York did no "more than accede to a position taken by the Attorney General" that creation of seven districts with at least 65% nonwhite populations was required by § 5 of the Voting Rights Act, and that the Attorney General's position was "authorized by our constitutionally permissible construction of § 5." *UJO*, 430 U.S. at 164 (plurality opinion).

Even if one overlooks the fact that the language cited from *UJO* did not command the support of a majority of the Justices, that language does not help Appellants because *UJO* is factually distinguishable from this case. In *UJO*, the Attorney General had recommended to New York adoption of the precise plan (seven districts with at least 65% nonwhite populations) that New York eventually adopted. In contrast, in this case the Attorney General did not recommend any specific plan to the North Carolina General Assembly, and even his general suggestion (that the General Assembly consider creation of a second majority-minority district in the south-central to southeast portion of the state) was simply ignored.

More importantly, *UJO* did not hold that states were entitled to act upon just *any* recommendation from the Attorney General. Rather, *UJO* immunized state plans from constitutional challenge only when the plan was explicitly recommended by the Attorney General to ensure compliance with the § 5 "non-retrogression principle" articulated in *Beer v. United States*, 425 U.S. 130 (1976).[4] *UJO*, 430 U.S. at 162-163. In *UJO*, the plaintiffs had

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[4] *Beer* established that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. In other words, the Attorney General is unwarranted in denying preclearance to a § 5 voting change simply because alternative changes might lead to increased voting power for minority groups -- so long as the proposed change would not *decrease* existing levels of minority voting power.

failed to demonstrate that minority voting rights would not regress had New York not adopted the race-conscious redistricting plan recommended by the Attorney General, and thus the plurality upheld race-conscious redistricting under the "non-retrogression principle." *Id.* In contrast, in the instant case, the facts as alleged by Appellants make clear that there was no danger that minority voting strength in North Carolina would regress in the absence of the race-conscious redistricting suggested by the Attorney General. Indeed, the July 9, 1991 plan objected to by the Attorney General called for the creation of one majority-minority congressional district (the First District) where no such district had existed under previous North Carolina districting schemes.

At the very least, Appellants are entitled to discovery on their claim that § 5 of the Voting Rights Act did not authorize creation of any majority-minority districts as a means of preventing retrogression in minority voting strength in the state. Accordingly, the district court erred in granting Appellees' motion to dismiss for failure to state a claim.

II. SECTION 2 OF THE VOTING RIGHTS ACT DOES NOT MANDATE THE TYPE OF RACIAL GERRYMANDERING ENGAGED IN BY NORTH CAROLINA

The State Appellees did not argue, in their Motion to Affirm, that race-conscious redistricting motivated by a desire to comply with § 2 of the Voting Rights Act, 42 U.S.C. § 1973, is immunized from constitutional challenge.[5] *Amici* nonetheless address that issue, because

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[5] Section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen (continued...)

the State Appellees are likely to make that claim in light of the Court's December 7, 1992 formulation of the question presented.

We note initially that there is nothing in the pleadings or the record below to suggest that the General Assembly adopted the Plan based on a good-faith desire to comply with § 2 of the Voting Rights Act.[6] Thus, even if one concedes that action taken based on a good-faith desire to comply with § 2 negates the possibility of an invidious discriminatory motive (and thus immunizes the actor from constitutional challenge), dismissal of Appellants' complaint on that ground was unwarranted in the absence of evidence that the state legislature was so motivated. Dismissal was particularly inappropriate in light of Appellants' explicit allegation that the General Assembly *did* act with invidious discriminatory intent. Jur. App. 101a-104a.

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[5] (...continued)
of the United States to vote on account of race or color.

The scope of § 2 was expanded significantly by the Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 134, which eliminated discriminatory intent as a necessary element of a § 2 violation. The 1982 law replaced the intent requirement with a requirement that courts hearing § 2 cases examine the "totality of the circumstances" to determine whether "the political processes leading to nomination or election . . . are not equally open to participation by members of [protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Voting Rights Act § 2(b), 42 U.S.C. § 1973(b). The 1982 law made clear, however, "[t]hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. *Id. See Thornburg v. Gingles*, 478 U.S. 30, 43 (1986).

[6] To the extent that the General Assembly adopted the Plan in response to prompting from the U.S. Attorney General, that action should be characterized as an attempt to comply with § 5 of the Voting Rights Act, since the Attorney General's preclearance authority extends only to § 5, not to § 2.

Moreover, this Court has never excused violations of one individual's constitutional rights on the grounds that the state actor was motivated by a desire to protect another individual's rights. *See Martin v. Wilks*, 109 S. Ct. 2180, 2188 (1989)("A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly 'settle,' voluntarily or otherwise, the conflicting claims of another group of employees who do not join in the agreement.") And state actors may not avoid exacting constitutional scrutiny of their racially motivated conduct "by conceding that they have discriminated in the past, now that it is in their interest to make such a concession," thereby setting up a claim that they are doing nothing more than voluntarily remedying their past transgressions. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 278-279 n.5 (plurality opinion).

Most importantly of all, § 2 of the Voting Rights Act quite clearly did not require North Carolina to act as it did in establishing two majority-minority congressional districts with "tortured" (Jur. App. 5a), noncompact boundaries. Appellants have alleged (and Appellees do not seriously dispute) that the General Assembly's sole purpose in creating such irregularly shaped districts was to create two districts that almost surely would elect black U.S. Representatives, and thereby provide blacks with representation in the North Carolina congressional delegation roughly proportionate to their numbers within the state. Yet § 2(b) of the Voting Rights Act explicitly states that § 2 does *not* provide protected classes with a right to proportional representation in elected bodies. This Court's sole decision construing § 2(b), *Thornburg v. Gingles*, 478 U.S. 30 (1986), emphasized that absence of proportional representation is not evidence that a racial group has suffered "unequal access to the to electoral system" (and thus that a § 2 violation has occurred), and that states are not required to take all conceivable steps to ensure proportional representation of all races. *Thornburg*, 430 U.S. at 43-46.

In sum, the State Appellees may not immunize their conduct from constitutional challenge by claiming that they were acting in conformity with the Voting Rights Act, because the Voting Rights Act did not require North Carolina to establish anything akin to the two tortured, noncompact majority-minority districts established under the Plan.[7]

III. APPELLANTS' RACIAL GERRYMANDERING ALLEGATIONS STATE A CLAIM FOR VIOLATION OF APPELLANTS' CONSTITUTIONAL RIGHTS

The Court's formulation of the "Question Presented" by this case (*see* page i) requests briefing regarding whether, under the facts of this case, the General Assembly's adoption of the Plan is immunized from constitutional challenge if adoption was motivated by a desire to comply with the Voting Rights Act and the Attorney General's interpretation thereof. Sections I and II of this brief demonstrate that such a motivation does not provide constitutional immunity under the facts of this case. However, this appeal cannot be resolved in its entirety if the Question Presented by the Court is the only issue resolved, because the district court's dismissal does not appear to have rested solely on a finding that the State Appellees' conduct was motivated by a desire to comply with the Voting Rights Act. Rather, the district court held

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[7] *Amici* argue in Section III of this brief that Appellants' allegation that the General Assembly acted with racially discriminatory intent in adopting the Plan states a cause of action for violation of their rights under the Fourteenth and Fifteenth Amendments. Any interpretation of the Voting Rights Act that suggested that the Act condones such racially discriminatory conduct would raise grave questions as to the constitutionality of the Act. Accordingly, the Court should avoid any such interpretation. It is a cardinal rule of statutory construction that where, as here, a contemplated construction of a statute would raise serious constitutional problems, a court will construe the statute to avoid such problems unless doing so is plainly contrary to the intent of Congress. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988).

that dismissal was proper because Appellants had failed to allege facts necessary to make out a claim for violation of their Fourteenth and Fifteenth Amendment rights. Jur. App. 22a-24a. *Amici* urge the Court to reach that issue and to hold that Appellants' complaint stated a claim for violation of their constitutional rights.

This Court has long held that the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment protect citizens not only against denial, on the basis of race, of their right to cast election ballots but also against election devices designed to abridge those rights. Thus, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court held that allegations of a racially motivated gerrymander of municipal boundaries (plaintiffs alleged that blacks were "fence[d] out" of town in order to deprive them of their pre-existing municipal vote) stated a claim under the Fifteenth Amendment and the Fourteenth Amendment's Equal Protection Clause. Similarly, in *Wright v. Rockefeller*, 376 U.S. 52 (1964), the Court said that allegations that a state congressional reapportionment plan has been racially gerrymandered states a claim under the Fourteenth and Fifteenth Amendment if it is shown that the state legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; or that the plan "was the product of a state contrivance to segregate on the basis of race or place of origin." *Wright*, 376 U.S. at 56, 58. *See also City of Mobile v. Bolden*, 446 U.S. 55, 62-66 (1980) (emphasizing that proof of a "racially discriminatory motivation" is the touchstone of all such Fourteenth and Fifteenth Amendment claims).

While acknowledging that Appellants had alleged that the General Assembly was motivated almost exclusively by racial considerations in adopting the Plan, the district court contended that such an allegation is insufficient to state a constitutional claim. Rather, the district court contended, Appellants were required to allege "a legislative intent to deprive white voters, including plaintiffs, of an equal opportunity with all other racial groups of voters -- on a statewide basis -- to participate in the political process and

to elect candidates of their choice." Jur. App. 23a. The district court also argued that Appellants failed to state a claim due to their failure to allege "the requisite constitutional effect," which the district court said consisted of an allegation that the Plan "has operated to 'fenc[e] out the white population of the [state, or either of the two challenged districts] from participation in the political processes of the [state or districts], [or to] minimize or unfairly cancel out white voting strength.'" *Id.* (quoting *UJO*, 430 U.S. at 165 (plurality opinion).

The language from *UJO* quoted by the district court enjoyed the support of only three members of the Court. *Amici* respectfully suggest that the quoted language (from Part IV of the plurality opinion in *UJO*) is inconsistent with other decisions of this Court and is not now good constitutional law, if it ever was. Part IV is inconsistent with the Court's prior holdings in *Gomillion* and *Wright* and with subsequent decisions that make clear that the Fourteenth and Fifteenth Amendments protect *individual* rights, not group entitlements.

A. Constitutional Rights Merit Protection on an Individual Basis, Rather Than on the Basis of Racial Groupings

The district court erred in judging Appellants' claims based on whether the Plan disadvantaged racial groupings to which Appellants belong. It may be true that ten of the 12 U.S. Representatives elected from North Carolina in 1992 are white, but that circumstance does not overcome the fact that the white Appellants living in the Twelfth District have effectively been disenfranchised by the conscious design of the General Assembly. Those Appellants now live in a congressional district which the General Assembly has determined should be represented by an African American. They have effectively been cut out of the electoral process, because the Twelfth District has been designed to ensure that successful candidates have only a limited need to appeal to the white community. Indeed, their district so grossly violates normal

compactness considerations that their ability to communicate with others in the district in order to encourage group political activity has been significantly impaired.[8]

As the dissenting judge on the district court pointed out, arguments that white voters in the First and Twelfth Districts are adequately represented by white Congressmen from other districts fly in the face of common understanding. Most voters desire representation by elected officials who live in their communities and share common economic conditions, not by officials from distant parts of the state. Jur. App. 46a-47a (Voorhees, J., dissenting). It is far more likely that "two voters of different races in a given geographically compact district will share the same interests and concerns and elect a mutually agreeable Representative, irrespective of race." *Id.*

The Court in other contexts has repeatedly emphasized that civil rights are to be judged on an individual basis, not on the basis of racial groupings. Thus, for example, in *Connecticut v. Teal*, 457 U.S. 441 (1982), the Court rejected a "bottom line" defense in disparate impact employment discrimination claims brought Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e *et seq.* The employer had argued that it could not be held liable under Title VII for maintaining a particular employment practice that had a disparate impact upon blacks, provided that the "bottom line" was that its employment practice, taken as a whole, had no racially disparate impact. The Court

[8] The district court's argument that Appellants have not adequately alleged that the General Assembly intentionally discriminated against them as white citizens (Jur. App. 23a) is frivolous. By racially gerrymandering the North Carolina congressional districts to ensure an increase from zero to (at least) two in the number of black Representatives, the General Assembly was, by definition, decreasing the number of white Representatives state-wide to (at most) ten and the number of white Representatives representing citizens of the First and Twelfth Districts from one to zero.

rejected that argument, stating, "The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole." *Teal*, 457 U.S. at 453-454. The Court held that an individual victim of racial discrimination should not be denied Title VII relief merely because, on a group-wide basis, members of his racial group have not been disadvantaged. *Id.* at 454-455.

Nor have defendants in "reverse discrimination" lawsuits (suits in which whites allege that they are the victims of racial discrimination) ever been permitted to defend on the ground that the plaintiffs are members of a racial group that, on the whole, has gotten more than a proportionate share of society's bounty. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Board of Education*, 467 U.S. 267 (1986); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). Rather, in each case the Court has examined the plaintiffs' claims of racial discrimination on an individualized basis.

In sum, the district court erred in dismissing Appellants' claims of racial discrimination on the basis that the racial group to which they belong has not suffered any "bottom line" injury. Rather, the district court should have permitted Appellants to attempt to prove that their individual rights under the Fourteenth and Fifteenth Amendments were violated by the General Assembly's adoption of the plan.

B. The General Assembly Violated Appellants' Right to Have Congressional Districts Lines Drawn on a Race-Blind Basis

Appellants do not complain merely that their voting rights have been abridged as a result of the racial gerrymandering alleged to have occurred in this case. They also complain that the Plan violates their (and every citizen's) Equal Protection rights to live in a society in which the government does not segregate voters on the

basis of race. *See* Appellants' Jurisdictional Statement at 35-36. That claim is cognizable under the Fourteenth Amendment, and the district court erred in dismissing it.

UJO is the only decision of this Court that has upheld conscious use of racial criteria in redistricting cases in the face of constitutional challenge, and the decision in *UJO* was quite limited: race may be taken into account for the purpose of ensuring (pursuant to § 5 of the Voting Rights Act) that voting-method changes enacted by jurisdictions with a history of discrimination against racial minority groups do not result in decreasing the ability of those minority groups to participate meaningfully in the electoral process. *UJO*, 430 U.S. at 162-165 (plurality opinion). The Court's other cases that have considered the constitutional ramifications of the issue (including *Gomillion* and *Wright*) have condemned drawing electoral districts along racial lines in no uncertain terms.

As Justice Douglas pointed out in *Wright*, racial gerrymandering is an evil without regard to its effects on the voting power of any individuals:

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.
>
> "Separate but equal" and "separate but better off" have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public.

Wright v. Rockefeller, 376 U.S. at 67 (Douglas, J., dissenting).[9]

In a variety of contexts, the Court has indicated that individuals' civil rights extend to the right to an environment free from state-mandated racial discrimination, without regard to whether the individual has suffered any other injury. Thus, criminal defendants (*Powers v. Ohio*, 111 S. Ct. 1364 (1991)), civil litigants (*Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991), and even criminal prosecutors (*Georgia v. McCollum*, 112 S. Ct. 2348 (1992)) are entitled under the Constitution to insist that courtroom adversaries not exercise peremptory challenges to strike jurors on the basis of their race, because allowing any state-sanctioned racial discrimination to infect the trial system calls into question the essential fairness of that system. Similarly, the Court has allowed housing discrimination "testers" who were never actually denied housing on the basis of race (because they never intended to rent the apartment they applied for) to sue for violations of the Fair Housing Act of 1968, 42 U.S.C. § 3604, because any housing discrimination on the basis of race "deprived them of the benefits that result from living in an integrated community." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375 (1982). *See, also, Loving v. Virginia*, 388 U.S. 1 (1967) (Constitution prohibits state laws outlawing inter-racial marriage, despite fact that such laws have an equal impact on all races).

The State Appellees contend that demanding that racial considerations play no part in redistricting efforts is unrealistic, because "[e]ven if redistricting lines were originally fashioned with no race-consciousness whatsoever, 'it is most unlikely that the . . . impact of

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[9] Justice Douglas dissented in *Wright* from the majority's holding that the plaintiffs had failed to prove that the state legislature had purposely drawn congressional districts along racial lines. The majority opinion strongly indicates that the majority did not disagree with the thoughts expressed by Justice Douglas regarding the evils of racial gerrymandering. *Wright*, 376 U.S. at 56, 58.

such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.'" State Appellees' Motion to Affirm at 16 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)). That argument ignores the common-sense distinction that the Court has regularly drawn between conduct with a discriminatory purpose and conduct taken "in spite of" its consequences:

> "'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effect upon an identifiable group."

City of Mobile, 446 U.S. at 71 n.17 (quoting *Personnel Manager of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)). In other words, states need not worry that their redistricting plans will be struck down as constituting an illegal racial gerrymander merely because drafters were aware of the effect that the plan would have on various racial groups.

Nor need we simply throw our hands in the air and concede that there is no such thing as a race-neutral redistricting plan. This Court has long recognized compactness of districting as an objective to be aspired to. *See, e.g., UJO*, 430 U.S. at 168 (plurality opinion)(describing "compactness" and "population equality" as "sound districting principles"); *Karcher v. Daggett*, 462 U.S. 725, 755-756 (1983). Legal scholars have devised a variety of methods for measuring objectively the extent to which the compactness of electoral districts in a given redistricting plan varies from optimal compactness. *See, e.g.*, D. Polsby and R. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale Law & Policy Review 301 (1991). Redistricting plans that closely approximate an objectively determinable optimal

compactness would be largely immune to claims that they were the result of unconstitutional racial gerrymandering. Of course, the close cases would be those (such as *Wright v. Rockefeller*) in which there is no "smoking gun" in the form of admissions that race played a role in redistricting. When, as here, no one seriously contests that race was the key determinant in drawing up the Plan, there should be little hesitation in finding a constitutional violation.

In sum, Appellants' allegation that the General Assembly denied them the right to live in a society free from state-sponsored racial discrimination states a cause of action under the Fourteenth Amendment's Equal Protection Clause. The district court erred in dismissing that claim.

CONCLUSION

Amici respectfully request that the judgment of the United States District Court for the Eastern District of North Carolina be reversed.

Respectfully submitted,

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